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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

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9 EDUARDO CAMACHO, Case No. 3:11-cv-00318-LRH-WGC
10 v. Petitioner, ORDER
11 E.K. McDANIEL, et al.,
12 Respondents.

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14 This is a habeas matter under 28 U.S.C. § 2254 in which petitioner Eduardo
15 Camacho is represented by counsel. Respondents have filed a motion to dismiss the
16 third-amended petition (ECF No. 51). Camacho opposed (ECF No. 53), and
17 respondents replied (ECF No. 54).

18 **I. Procedural History and Background**

19 On October 6, 2006, a jury convicted Camacho of count 1: first-degree murder with
20 the use of a deadly weapon; count 2: attempted robbery with the use of a deadly
21 weapon; count 3: burglary with the use of a deadly weapon; count 4: battery with a
22 deadly weapon causing substantial bodily harm; and count 5: battery with a deadly
23 weapon (exhibit 16).¹ The state district court sentenced him as follows: count 1: life
24 with the possibility of parole after 20 years plus a consecutive term of life with the
25 possibility of parole after 20 years for the deadly weapon enhancement; count 2: 40 to

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¹ The court shall reference the exhibits that petitioner filed in support of his third-amended petition (ECF
28 No. 43) as "exhs. 1-81." Exhibits 1-81 are found at ECF Nos. 44-50. The court notes that petitioner
should have sequentially followed respondents' exhibits already on file and filed his first exhibit as exhibit
123.

1 120 months with a consecutive 40 to 120 months for the deadly weapon enhancement;
2 count 3: 26 to 120 months, with a consecutive 26 to 120 months for the deadly weapon
3 enhancement; count 4: 60 to 180 months; count 5: 24 to 72 months. Exh. 22.
4 Judgment of conviction was entered on March 16, 2007. *Id.* A corrected judgment of
5 conviction was filed that same day to reflect that counts 2 and 3 were to run
6 concurrently to count 1 and counts 4 and 5 were to run consecutively to all other counts.
7 Exh. 23.

8 On July 14, 2008, the Nevada Supreme Court affirmed Camacho's convictions and
9 vacated in part and remanded the matter to the state district court because the court
10 had improperly enhanced the sentence for burglary with a deadly weapon
11 enhancement. Exh. 28. Remittitur issued on August 8, 2008. Exh. 29. Pursuant to the
12 Nevada Supreme Court's order, the second corrected judgment of conviction was
13 entered on December 10, 2008. Exh. 30.

14 Camacho filed a pro per state postconviction petition for habeas corpus in March
15 2009, the state district court subsequently appointed counsel, and Camacho filed a
16 counseled supplement to the petition. Exhs. 31, 35, 39.

17 In the meantime, on June 4, 2009, Camacho filed a proper person motion to correct
18 illegal sentence and vacate judgment. Exh. 37. On June 9, 2010, the Nevada Supreme
19 Court affirmed the denial of the motion, and remittitur issued on July 7, 2010. Exhs. 55,
20 56.

21 On October 19, 2009, the state district court dismissed grounds 1-8 of the
22 postconviction petition as procedurally barred and granted an evidentiary hearing as to
23 ground 9. Exh. 46. After the evidentiary hearing, the state district court entered its
24 order denying the petition on January 12, 2010. Exh. 50. On April 6, 2011, the Nevada
25 Supreme Court affirmed the denial of the petition, and remittitur issued on May 3, 2011.
26 Exhs. 62, 63.

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1 On May 4, 2011, Camacho dispatched his federal habeas petition for filing (ECF No.
2 7). This court granted Camacho's motion for stay of his federal proceedings (ECF No.
3 30), and Camacho filed a second state postconviction on November 7, 2011. Exh. 64.
4 On September 17, 2014, the Nevada Supreme Court affirmed the denial of the petition
5 as untimely, successive and an abuse of the writ, and remittitur issued on October 15,
6 2014. Exhs. 79, 80.

7 Ultimately, this court appointed counsel, and the counseled, third-amended petition
8 was filed on November 9, 2015 (ECF No. 43). Respondents now argue that grounds
9 2(B) and 3(B) do not relate back to the original petition and, alternatively, are
10 unexhausted (ECF No. 51).

11 **II. Legal Standards & Analysis**

12 **a. Relation Back**

13 Respondents argue that grounds 2(B) and 3(B) in the third-amended petition do not
14 relate back to the original petition and should thus be dismissed as untimely (ECF No.
15 51, pp. 10-11). A new claim in an amended petition that is filed after the expiration of
16 the Antiterrorism and Effective Death Penalty Act ("AEDPA") one-year limitation period
17 will be timely only if the new claim relates back to a claim in a timely-filed pleading
18 under Rule 15(c) of the Federal Rules of Civil Procedure, on the basis that the claim
19 arises out of "the same conduct, transaction or occurrence" as a claim in the timely
20 pleading. *Mayle v. Felix*, 545 U.S. 644 (2005). In *Mayle*, the United States Supreme
21 Court held that habeas claims in an amended petition do not arise out of "the same
22 conduct, transaction or occurrence" as claims in the original petition merely because the
23 claims all challenge the same trial, conviction or sentence. 545 U.S. at 655–64.
24 Rather, under the construction of the rule approved in *Mayle*, Rule 15(c) permits relation
25 back of habeas claims asserted in an amended petition "only when the claims added by
26 amendment arise from the same core facts as the timely filed claims, and not when the
27 new claims depend upon events separate in 'both time and type' from the originally
28 raised episodes." 545 U.S. at 657. In this regard, the reviewing court looks to "the

1 existence of a common ‘core of operative facts’ uniting the original and newly asserted
2 claims.” A claim that merely adds “a new legal theory tied to the same operative facts
3 as those initially alleged” will relate back and be timely. 545 U.S. at 659 and n.5; *Ha*
4 *Van Nguyen v. Curry*, 736 F.3d 1287, 1297 (9th Cir. 2013).

5 Here, the parties do not dispute that grounds 2(B) and 3(B) must relate back to the
6 original petition in order to be deemed timely (ECF Nos. 51, 53).

7 **Ground 2(B)**

8 Camacho argues that his trial counsel rendered ineffective assistance in violation of
9 his Sixth and Fourteenth Amendment rights when counsel failed to move for a mistrial
10 and failed to move to have Camacho’s trial severed from his co-defendants’ (ECF No.
11 43, pp. 24-26). Camacho asserts that his counsel knew that he wanted to testify on his
12 own behalf and was present when his co-defendant Brian Snapp threatened and
13 intimidated him into not testifying. *Id.*

14 In Camacho’s original federal petition, he claimed that his trial counsel was
15 ineffective when he advised him not to testify when counsel knew he wanted to testify
16 on his own behalf after counsel witnessed Snapp threatening petitioner into not
17 testifying (ECF No. 7, p. 16).

18 While ground 2(B) adds the legal theories that trial counsel failed to move for a
19 mistrial and failed to move to have Camacho’s trial severed, these new theories are
20 clearly tied to the same operative facts as those alleged in the original petition. *Ha Van*
21 *Nguyen*, 736 F.3d at 1297. Accordingly, ground 2(B) relates back and is timely.

22 **Ground 3(B)**

23 Camacho claims that his appellate counsel was ineffective for failing to raise federal
24 ground 2(B) -- trial counsel’s alleged ineffective assistance for failing to move for a
25 mistrial and failing to move to have Camacho’s trial severed (ECF No. 43, pp. 29-31).

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1 Respondents argue that ground 3(B) does not relate back and is unexhausted (ECF
2 No. 51, pp. 11-13). As ground 2(B) relates back, ground 3(B) would also relate back
3 even with the additional legal theory of ineffective assistance of appellate counsel.

4 However, this court need not consider whether any part of ground 3 is exhausted
5 because it must be denied on the merits. Ground 3(A) is also a claim of ineffective
6 assistance of appellate counsel – for failing to raise on appeal the claim of ineffective
7 assistance of trial counsel for failing to allow Camacho to testify in his own defense
8 (ECF No. 43, pp. 26-29). 28 U.S.C. §2254(b)(2) provides: “[a]n application for a writ of
9 habeas corpus may be denied on the merits, notwithstanding the failure of the applicant
10 to exhaust the remedies available in the courts of the state. A federal court may deny
11 an unexhausted claim on the merits only when the court finds it is perfectly clear that
12 the applicant does not raise even a colorable federal claim and therefore has no chance
13 of obtaining relief. *Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005).

14 The Nevada Supreme Court has consistently held that it will not entertain claims of
15 ineffective assistance of counsel on direct appeal. *Corbin v. State*, 892 P.2d 580 (Nev.
16 1995), citing *Gibbons v. State*, 634 P.2d 1214 (Nev. 1981); *but see Archanian v. State*,
17 145 P.3d 1008, 1020- 21 (Nev. 2006) (the Nevada Supreme Court “has repeatedly
18 declined to consider ineffective-assistance-of-counsel claims on direct appeal unless
19 the district court has held an evidentiary hearing on the matter or an evidentiary hearing
20 would be needless.”) (emphasis omitted) (see also ECF Nos. 53, p. 16 and 54, pp. 5-6).

21 Camacho fails to demonstrate his case would be subject to the very limited
22 exceptions that would permit the Nevada Supreme Court to entertain such allegations of
23 ineffective assistance of trial counsel on direct appeal. Camacho has not demonstrated
24 how appellate counsel was ineffective for failing to raise allegations that the Nevada
25 Supreme Court would not have addressed in the first place. Accordingly, federal
26 habeas relief is denied as to the entirety of ground 3.

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b. Exhaustion, Anticipatory Default/Technical Exhaustion and Procedural Default

2 Next, respondents argue that ground 2(B) is unexhausted (ECF No. 51, pp. 12-13).
3 A federal court will not grant a state prisoner's petition for habeas relief until the prisoner
4 has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455
5 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair
6 opportunity to act on each of his claims before he presents those claims in a federal
7 habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); see also *Duncan v.*
8 *Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the petitioner has
9 given the highest available state court the opportunity to consider the claim through
10 direct appeal or state collateral review proceedings. See *Casey v. Moore*, 386 F.3d
11 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir. 1981).

12 Camacho acknowledges that ground 2(B) is unexhausted (ECF No. 53, p. 9). He
13 argues that this court should deem the claim technically exhausted but procedurally
14 defaulted. “Procedural default” refers to the situation where a petitioner in fact
15 presented a claim to the state courts but the state courts disposed of the claim on
16 procedural grounds, instead of on the merits. A federal court will not review a claim for
17 habeas corpus relief if the decision of the state court regarding that claim rested on a
18 state law ground that is independent of the federal question and adequate to support
19 the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).

20 The *Coleman* Court explained the effect of a procedural default:

21 In all cases in which a state prisoner has defaulted his federal claims in state
22 court pursuant to an independent and adequate state procedural rule, federal
23 habeas review of the claims is barred unless the prisoner can demonstrate cause
24 for the default and actual prejudice as a result of the alleged violation of federal
law, or demonstrate that failure to consider the claims will result in a fundamental
miscarriage of justice.

²⁵ *Coleman*, 501 U.S. at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986).

26 The procedural default doctrine ensures that the state's interest in correcting its own

1 mistakes is respected in all federal habeas cases. See *Koerner v. Grigas*, 328 F.3d
 2 1039, 1046 (9th Cir. 2003).

3 To demonstrate cause for a procedural default, the petitioner must be able to “show
 4 that some objective factor external to the defense impeded” his efforts to comply with
 5 the state procedural rule. *Murray*, 477 U.S. at 488 (emphasis added). For cause to
 6 exist, the external impediment must have prevented the petitioner from raising the
 7 claim. See *McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

8 Camacho points out that if he returned to the state courts with this claim, it would be
 9 defaulted as untimely and successive. See 28 U.S.C. §2254(b)(1)(B). Notably, the
 10 Nevada Supreme Court already affirmed the denial of Camacho’s second (2011) state
 11 postconviction as time-barred, successive and an abuse of the writ. Exh. 79.

12 “A federal court may not grant habeas relief to a state prisoner unless he has
 13 properly exhausted his remedies in state court.” *Dickens v. Ryan*, 740 F.3d 1302, 1317
 14 (9th Cir. 2014) (citing *Coleman v. Thompson*, 501 U.S. 722, 731 (1991)). “An
 15 unexhausted claim will be procedurally defaulted, if state procedural rules would now
 16 bar the petitioner from bringing the claim in state court.” *Id.* “A prisoner may obtain
 17 federal review of a defaulted claim by showing cause for the default and prejudice from
 18 a violation of federal law.” *Martinez v. Ryan*, 132 S.Ct. 1309, 1316 (2012) (citing
 19 *Coleman v. Thompson*, 501 U.S. at 750)). Camacho argues that he cannot overcome
 20 the default in the state courts based on the Nevada Supreme Court’s determination that
 21 postconviction counsel’s ineffectiveness cannot provide cause to overcome a defaulted
 22 ground of trial and appellate counsel’s ineffectiveness in Nevada. See *Brown v.*
 23 *McDaniel*, 331 P.3d 867, 875 (Nev. 2014) (declining to apply *Martinez v. Ryan*, 132
 24 S.Ct. 1309 (2012), discussed below, to state postconviction scheme). Camacho,
 25 therefore, urges this court to apply “anticipatory default” and/or to conclude that this
 26 ground is technically exhausted but procedurally barred. Respondents acknowledge in
 27 reply that ground 2(B) likely falls within the scope of Nevada’s procedural default rules,
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1 *i.e.*, that the state courts would find it procedurally barred (ECF No. 54, p. 54). The
 2 court agrees and finds that ground 2(B) is technically exhausted and procedurally
 3 barred.

4 Camacho argues that, if ground 2(B) is considered technically exhausted but
 5 procedurally defaulted, he can demonstrate cause and prejudice to excuse the default.
 6 The Supreme Court has established an equitable rule that ineffective assistance of
 7 counsel for failing to raise a claim of ineffective assistance of trial counsel in the state
 8 court initial-review collateral proceedings may serve as cause to overcome the state
 9 procedural bar. *Martinez v. Ryan*, 132 S.Ct. 1309, 1315, 1318-20 (2012). A reviewing
 10 court must determine (1) whether the petitioner's attorney in the first collateral
 11 proceeding, if counsel was appointed, was ineffective under *Strickland v. Washington*,
 12 466 U.S. 668, 687, 104 S.Ct. 2052 (1984), (2) whether the petitioner's claim of
 13 ineffective assistance of trial counsel is "substantial," and (3) whether there is prejudice.
 14 *Sexton v. Cozner*, 679 F.3d 1150, 1159 (9th Cir. 2012), citing *Martinez*, 132 S.Ct. at
 15 1321. Thus, according to the process outlined by the Ninth Circuit, in order to overcome
 16 the procedural bar to an ineffective assistance of trial counsel claim using *Martinez*,
 17 petitioner

18 must show that trial counsel was ... ineffective, and that PCR [post
 19 conviction review] counsel's failure to raise trial counsel's ineffectiveness
 20 in the PCR proceeding fell below an objective standard of
 21 reasonableness. If trial counsel was not ineffective, then [the petitioner]
 22 would not be able to show that PCR counsel's failure to raise claims of
 23 ineffective assistance of trial counsel was such a serious error that PCR
 24 counsel "was not functioning as the 'counsel' guaranteed" by the Sixth
 25 Amendment.

26 *Sexton*, 679 F.3d at 1159 (quoting *Strickland*, 466 U.S. at 687). Where no counsel
 27 was appointed on postconviction review, cause is assumed and petitioner must
 28 demonstrate that his underlying ineffective assistance of trial counsel claim is
 substantial. *Martinez*, 132 S.Ct. at 1318-19.

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1 The Court in *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), further summarized what
 2 *Martinez* required in order to establish whether a federal court may excuse a state court
 3 procedural default.

4 “Cause” to excuse the default may be found:

5 [W]here (1) the claim of “ineffective assistance of trial counsel” was a
 6 “substantial” claim; (2) the “cause” consisted of there being “no counsel” or
 7 only “ineffective” counsel during the state collateral review proceeding; (3)
 8 the state collateral review proceeding was the “initial” review proceeding in
 9 respect to the “ineffective-assistance-of-counsel claim”; and (4) state law
 10 requires that an “ineffective assistance of trial counsel [claim] ... be raised
 11 in an initial-review collateral proceeding.”

12 *Trevino*, 133 S.Ct. at 1918, quoting *Martinez*, 132 S.Ct. at 1318-19, 1320-21.

13 When the petitioner was represented by counsel during the initial-review collateral
 14 proceedings, he or she may demonstrate cause by showing that counsel in the initial-
 15 review collateral proceedings was ineffective under *Strickland v. Washington*, 466 U.S.
 16 668 (1984). *Martinez*, 132 S.Ct. at 1318. The *Martinez* Court explained: “It is likely that
 17 most of the attorneys appointed by the courts are qualified to perform, and do perform,
 18 according to prevailing professional norms; and, where that is so, the States may
 19 enforce a procedural default in federal habeas proceedings.” *Id.* at 1319. The Court
 20 emphasized that its ruling applied to initial-review collateral proceedings only and not to
 21 any other proceedings, including appeals from initial-review collateral proceedings. *Id.*
 22 at 1320.

23 To determine whether petitioner suffered prejudice because his state postconviction
 24 counsel did not raise a claim, the question must be answered: is the procedurally
 25 defaulted claim “substantial?” *Martinez*, 132 S.Ct. at 1321. The Court in *Martinez* cited
 26 to *Miller-El v. Cockrell*, 537 U.S. 322 (2003) for its standard requiring the petitioner to
 27 make a substantial showing of the denial of a constitutional right, suggesting that this
 28 standard is appropriate in deciding if a claim would satisfy the prejudice prong for
 29 overcoming a procedural default. *Id.* at 1319. Under *Miller-El*, a petitioner need not
 30 show that he will prevail on the merits. *Miller-El*, 537 U.S. at 337, citing *Barefoot v.*

1 *Estelle*, 463 U.S. 880, 893 n.4 (1983) (a showing that “a court could resolve the issue
2 [differently] or that the questions are adequate to deserve encouragement to proceed
3 further” is sufficient to meet the substantial showing required for appellate review); see
4 also *Slack v. McDaniel*, (“The petitioner must demonstrate that reasonable jurists would
5 find the district court’s assessment of the constitutional claims debatable or wrong.”) 529
6 U.S. 473, 484 (2000).

7 Here, the court concludes that the issue as to whether cause and prejudice exists to
8 excuse the procedural bar of ground 2(B) is intertwined with the resolution of the merits
9 of the claim to the extent that it best serves judicial economy to defer this court’s cause
10 and prejudice determination at this time. Accordingly, respondents’ motion to dismiss is
11 denied without prejudice as to ground 2(B). The parties may renew their arguments in
12 the conjunction with their briefing of the petition on the merits.

13 **III. Conclusion**

14 **IT IS THEREFORE ORDERED** that respondent’s motion to dismiss (ECF No. 51)
15 is **GRANTED** in part and **DENIED** without prejudice in part as follows:

16 The motion to dismiss ground 2(B) is **DENIED** without prejudice.

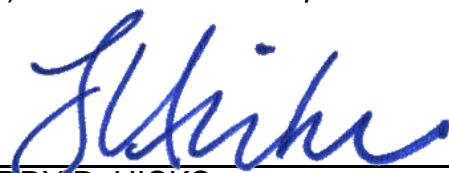
17 Ground 3 is **DENIED** in its entirety.

18 **IT IS FURTHER ORDERED** that respondents shall have **sixty (60) days** from
19 the date this order is entered within which to file an answer to the third-amended petition
20 as set forth in this order.

21 **IT IS FURTHER ORDERED** that petitioner shall have **forty-five (45) days**
22 following service of respondents’ answer in which to file a reply.

23 **IT IS FURTHER ORDERED** that petitioner’s motion for extension of time to file
24 an opposition to the motion to dismiss (ECF No. 52) is **GRANTED nunc pro tunc**.

25 DATED this 27th day of September, 2016.


26

LARRY R. HICKS
27 UNITED STATES DISTRICT JUDGE
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